

F. M. S. REPORTS.

[CRIMINAL REVISIONARY JURISDICTION]

CUSSEN, J.

February 2, 1938.

PUBLIC PROSECUTOR v. TAN YOOK KEE.
(KUALA LUMPUR CRIMINAL CASE No. 3287 of 1937)

PUBLIC PROSECUTOR v. KUPUSAMY.
(KUALA LUMPUR CRIMINAL CASE No. 3463 of 1937)

Criminal Procedure Code (Chapter 6) s. 278; s. 283—Sentence of imprisonment in default of payment of fines. Magistrate, after imprisonment has begun, ordering release from imprisonment and payment of fine by instalment—Legality.

The Superintendent of Prisons, Kuala Lumpur, submitted two Warrants of Commitment Nos. 187534 and 187536 in which the Magistrate, Kuala Lumpur, directed sentences of imprisonment in default of payment of fines.

Subsequently to the prisoners being confined in Kuala Lumpur Prison under these warrants the Magistrate, under Section 30 of the Prisons Enactment, directed the production of the prisoners before him and released the prisoners from custody on the execution of a "bond to pay the fines by instalment," in one case and "pending realisation of the fine" in the other case.

Upon revision (on reference by Superintendent of Prisons):—

Held, that there was nothing illegal in what the Magistrate had done.

REVISION.

M. C. Hay, Deputy Legal Adviser, as *amicus curiae*.

Cussen, J.—I do not think there is anything illegal in what has been done. It does not, in my opinion, contravene the provisions of section 278 Criminal Procedure Code—the judgment therein referred to consists of the conviction and sentence. The sentence is that provided by the substantive section of the Penal Law; in the present instances it is a fine that has been imposed. It would be against section 278 Criminal Procedure Code if the Magistrate had altered the fine, for the fine is the sentence and so part of the judgment.

The provisions of section 283 (i) (b) are not part of the sentence but alternative methods of enforcing the sentence as is evident from the words used *i.e.* "the Court passing the sentence may...."

I agree with the Deputy Legal Adviser that the Magistrate, who imposes the sentence of fine, is not "functus officio" there and then, and can exercise any of the powers given by section 283 (i) (f) at any appropriate time until the fine is paid or levied.

I think that it is in the interests largely of the persons sentenced that this should be so; as the provisions of that section (283 (i) (b)) are obviously framed to enable the Court to give any consideration to what is in the best interests of the person sentenced *e.g.* the first proviso to section 283 (i) (b) (4).

Magistrate's action upheld.

[ORIGINAL CRIMINAL JURISDICTION]

HOWES, J.

March 8, 1938.

PUBLIC PROSECUTOR

v.

PAW SEI PUAN AND NINE OTHERS.
(NEGRI SEMBILAN CRIMINAL TRIAL No. 3 of 1938)

Criminal Procedure Code (Chapter 6) s. 166; s. 167 and s. 302—Plea of previous acquittal—Same facts—Acquittal on charge of murder—Subsequent trial on charge of rioting.

Ten accused persons were charged at Assizes with rioting, under section 147 of the Penal Code. Three of the accused had already been charged with murder, alleged to have been committed during the course of events out of which the charge of rioting arose, and had been separately tried on that charge and had been acquitted.

Held, that a plea of previous acquittal was not available to the three accused.

M. C. Hay, Deputy Legal Adviser, for Public Prosecutor.

Ernest Jeff for the accused.

Howes, J.—In this case, the ten Accused appear for trial on a charge of rioting under section 147 of the Penal Code, namely, that they on the 30th of October, 1937, at Chuah Village "were members of an unlawful assembly and in prosecution of the common object of such assembly namely using criminal force to Haji Jauhari and Haji Jelani committed the offence of rioting."

Before the Accused were charged, Mr. Jeff raised a preliminary objection to the inclusion of Accused Nos. 8, 9 and 10 in the charge, on the ground that they had already been charged with the murder of Haji Jelani in the course of the same transaction out of which the present charge of rioting arises, and had been acquitted.

Mr. Jeff referred to section 302 (i) of the Criminal Procedure Code which reads:—

"A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167."

In order that Mr. Jeff's objection may succeed, it must be shown that these three persons will be tried again on the same facts for another offence (namely rioting) for which a different charge from the one made against them (namely that of murder) might have been made at the former trial under section 166 or for which they might have been convicted under section 167.

Section 166 is limited to cases in which it is doubtful which of several offences the facts which can be proved will constitute; and from illustration (a) to that section, it is clear that it is intended to apply only to offences which are analogous in character, e.g. theft or receiving stolen property, or criminal breach of trust or cheating.

In the former trial the charge was murder, which bears no analogy to rioting; nor could there have been any doubt as to which offence the facts intended to be proved would constitute. It cannot be suggested that rioting is an ingredient or a constituent part of the offence of murder, in the same way as hurt or grievous hurt may be.

Mr. Hay, for the Public Prosecutor, contended that since the charge against the three Accused was murder they could not have been charged with rioting in the same charge, under section 166. In support, he quoted English decisions to the effect that in charges of murder or manslaughter any other charges arising out of the same facts should be the subject of separate indictments.

It will be noted that the plea of previous acquittal or conviction given by section 302 (i) is limited to cases in which a different charge from the one made against the Accused might have been made under section 166 or of which he might have been convicted under section 167. It does not apply to section 165 under which, if in one series of acts so connected

together as to form the same transaction more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence.

It is clear that rioting would be a distinct offence within section 302 (ii) for which a separate charge *might* have been made against the Accused in the former trial under section 165, but could not have been made under section 166.

In the present state of our Code, I can see no legal objection to the addition, in a charge of murder, of another charge of a different character, provided that the other offence was so connected with the murder as to form one transaction, and provided that the Accused is not embarrassed in any way in his defence; notwithstanding the fact that, following the English practice, it is unusual in these States to combine a charge of a different offence with one of murder.

This being so, section 302 (ii) expressly provides that in spite of acquittal or conviction, a person may be afterwards tried for a distinct offence for which a separate charge might have been made in the former trial under section 165.

Illustration (b) to section 302 shows clearly that even after an acquittal for murder an Accused person may be charged with and tried for robbery committed at the time when the murder was committed, and I can see no reason why in the present case the charge of rioting cannot be made against these three persons notwithstanding the fact of their acquittal on the murder charge.

In these circumstances the preliminary objection by Mr. Jeff fails.

Objection overruled.

[COURT OF CRIMINAL APPEAL]

ROGER HALL, C.J. (F.M.S.) McELWAIN, C.J.
(S.S.) AND MURRAY-ANYSLEY, J.

March 30, 1938.

MOHAMED ISA BIN LEMAN - Appellant.

vs.

PUBLIC PROSECUTOR - Respondent.

(PAHANG CRIMINAL APPEAL No. 1 of 1938)

*Criminal Procedure Code (Cap. 6) S. 115 (iii)—
Confession—Absence of memorandum from—Interrogation
by recording Magistrate—Evidence Enactment (Cap. 10) S. 80; S. 105—Insanity—Burden of proof
—Quantum of proof.*